

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative  
Penalty Order Issued to Matthew  
Husnik and Northland Constructors,  
Inc.

FINDINGS OF FACT, CONCLUSIONS  
AND RECOMMENDED ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on February 9, 1998 at the Government Services Center, Seventh Floor, 320 West Second Street, Duluth, Minnesota.

William P. Hefner and John K. Lampe, Assistant Attorneys General, Public and Human Resources Section, EPD Division, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Staff of the Minnesota Pollution Control Agency.

Kevin C. Cornwell, Stauber & Lein, Attorneys at Law, 1011 East Central Entrance, Duluth, Minnesota 55811-5501, appeared on behalf of Matthew Husnik and Northland Constructors of Duluth, Inc.

The record of the proceeding closed on February 25, 1998, with the receipt by the Administrative Law Judge of the Reply Brief of counsel for the Minnesota Pollution Control Agency.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 116.072, subd. 6, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Peder A. Larson, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155-2194, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Matthew Husnik and Northland Constructors, Inc. were required to obtain a National Pollutant Discharge Elimination System (NPDES) storm-water permit before clearing and grading a site located at the northeast corner of the intersection of Interstate 35 and Minnesota Highway 23.

Whether Matthew Husnik and Northland Constructors, Inc. violated Minn. Stat. § 115.061 by failing to notify the Minnesota Pollution Control Agency of the runoff of sediment-laden water from the site and by failing to take immediate and reasonable action to "abate pollution of waters of the state."

If such violations occurred, whether the monetary penalty assessed by the Minnesota Pollution Control Agency is reasonable and appropriate.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Matthew Husnik is the fee owner of real property located within the municipality of Sandstone, Minnesota at the northeast corner of the intersection of Interstate 35 and Minnesota Highway 23 (hereafter the "Sandstone Site"). The area consists of approximately 30 acres. Matthew Husnik purchased the property in the spring of 1995 from the estate of Nels Lundorff.

2. The previous owner managed the property as a woodland area under a Woodland Management Plan whereby timber was selectively harvested for sale. Exhibit 20. The timber stand on the property was an abundant variety. The trees included Norway and red pine, white spruce, aspen, birch, elm, oak and sugar maple. Id. The objectives of the Woodland Management Plan included the following: "to provide wildlife habitat and recreation; to improve water quality and quantity; and to prevent erosion." Exhibit 20.

3. In the Spring of 1996, Mr. Husnik conferred with Sandstone city officials about commercial development of the property. Out of those discussions, Mr. Husnik submitted to the City of Sandstone a "conceptual plan" for commercial development of the site. The conceptual plan included a motor inn, 24-hour restaurant, fast-food restaurant, specialty shops and a car wash. Exhibit 21.

4. The Sandstone site is now zoned commercial or industrial.

5. In the late spring of 1996, Matthew Husnik hired Northland Constructors, Inc. (Northland) to "rough grade" and level the area, removing all trees and vegetation. Northland worked at the Sandstone site for approximately two months, leveling and grading the area. Northland stripped topsoil and surface debris and stockpiled it at the site. James Holmgren, President of Northland, indicated that the Company charged Matthew Husnik approximately \$30,000 for the work at the site.

6. Matthew Husnik was not aware of the Woodland Management Plan for the site at the time he hired Northland to clear and grade the area. He learned of the Woodland Management Plan in late 1997, more than a year after the clearing and grading activities at the site had been completed. At the hearing, Matthew Husnik expressed the belief that the use of the property should continue according to the Woodland Management Plan or be used for agricultural purposes.

7. On or about May 23, 1996, MPCA staff inspected the Sandstone site as a result of a complaint by a citizen concerned about soil erosion from the site. An inspection of the site showed that there was no erosion and sedimentation control in place to prevent discharge of sediment-laden water from the site. In a letter dated June 19, 1996, MPCA employee Keith L. Cherryholmes, informed Matthew Husnik of the results of the inspection on May 23, 1996. He informed Matthew Husnik that a National Pollutant Discharge Elimination System ("NPDES") general permit for construction was required before performing construction activity such as that performed at the Sandstone site. He informed Matthew Husnik that the failure to obtain a NPDES permit before initiating construction activity "is a serious violation of MPCA's rules and may result in enforcement action being taken." Matthew Husnik was required to submit an application for a NPDES permit and provide both a temporary and permanent erosion and sedimentation control plan for the Sandstone site. He was required to submit these within seven days of the June 19, 1996 letter. Exhibit 1.

8. Matthew Husnik did not reply to the June 19, 1996 letter from Keith Cherryholmes.

9. After Matthew Husnik failed to respond to Keith Cherryholmes' June 19 letter, the MPCA file on the Sandstone site was transferred to John Thomas, Water Quality Specialist located in Duluth. John Thomas visited the Sandstone site numerous times, including inspections on June 27, 1996; July 22, 1996; July 30, 1996; September 17, 1996; October 22, 1996 and December 17, 1997. He took photographs of the Sandstone site and made notes of his observations. Exhibits 4A-G; 5A-J; 6A-F and 7A and B are photographs of the Sandstone site taken by John Thomas.

10. Exhibits 4A, 4B, 5A, 6A and 6B show that the Sandstone site had been completely stripped of vegetation. Those exhibits show that the site had been cleared and had a generally flat surface on top with sloping edges. Mr. Thomas measured the site on July 22, 1996 with a wheel designed to measure linear distances. He determined that the "plateau" portion of the site measured approximately 5.5 acres.

11. Exhibits 4B, 4C, 5C, 5D, 5F, 6D, 6E, 7A and 7B show that by July 22, 1996, gullies had already cut into the sloped area of the site. The gullies were the result of rain water striking the exposed subsoil and washing it away from the site.

12. When vegetation and topsoil are removed from an area, that area becomes susceptible to soil erosion. Vegetation and topsoil contain porous organic materials which absorb moisture. Once they are removed, the subsoils have less ability to absorb moisture and, therefore, when rain falls, water runs off, transporting sediment offsite in the process. The gullies shown in the photographs are the result of sediment being transported off the Sandstone site.

13. MPCA investigator John Thomas determined that sediment from the Sandstone site was being transported offsite into a wildlife pond approximately a quarter of a mile from the site. The transport of the sediment occurred as follows: rain hit the exposed subsoil at the Sandstone site, washed it toward the southeast quarter of the site near a facility owned by Minnesota Power, where the contaminated water entered a ditch and traveled into a culvert. See Exhibits 5G and 5H. The culvert then transported the water and sediment into a wildlife pond on the other side of Highway 23. See Exhibits 5I and 5J. The reddish-brown color of the sediment in the water in the culvert, the ditch and the wildlife pond match the reddish-brown color of the soil on the Sandstone site.

14. Because of the topographical contours of the area immediately adjacent to the southeast corner of the Sandstone site, drainage from the Sandstone site ran in channels and ditches from the Sandstone site to the wildlife pond across Highway 23. During the period in question, between May and September 1996, there were no other construction sites in the area in which drainage carrying sediment would have come to the wildlife pond.

15. Erosion can be greatly reduced at a site where soils have been disturbed by the installation of "silt fences". A silt fence is a porous, synthetic fabric that is staked into the ground which allows water to pass through. A silt fence slows water transport sufficient to settle much of the sediment before it moves off-site. Silt fences must be installed properly; they must be staked securely with the bottom portion of the fabric material trenched into the ground so that water cannot pass underneath.

16. When MPCA investigator John Thomas first visited the Sandstone site on June 27, 1996, he saw no properly installed erosion control at the site. As can be seen from Exhibits 4D, 4E, 4F, and 4G, approximately 100 feet of silt fence had been installed at the southeast corner of the Sandstone site. However, that silt fence was not properly installed. The bottom portion of this silt fence was not trenched in the ground as shown on Exhibits 4G and 5E. As a result, sediment-laden water passed underneath the silt fence without filtering through the porous silt fence.

17. As a result of his inspection on June 27, 1996, MPCA investigator John Thomas concluded that sediment from the Sandstone site was being discharged and was causing water pollution.

18. John Thomas has substantial experience investigating storm water runoff. He has worked at the MPCA for approximately eight years. He has a master's degree in public health and a bachelor of science degree in biology from the University of Minnesota. In his professional capacity, he has studied the effects of storm water in urban areas running off of commercial, industrial and residential sites. He has inspected approximately 60 construction sites involving public highway construction and commercial and industrial developments.

19. The primary concern with storm water runoff is its impact on water quality. At sites where the soils have been disturbed and the subsoils are exposed, they become prime targets for sediment erosion problems. Sediment diminishes water quality in several ways. When sediment is present in water, the sediment can cause the water to absorb more heat. The amount of oxygen dissolved in the water decreases

both the reduced oxygen in the water and the increased heat have a harmful impact on fish and other aquatic life. When sediment is present in water, it can cause harm to fish by irritating and clogging their gills or by burying spawning and feeding areas.

20. The MPCA made several attempts to persuade Matthew Husnik and Northland to obtain a permit and to install sediment and erosion controls at the Sandstone site. On July 23, 1996, John Thomas talked with both James Oswald from Northland and Matthew Husnik. At this time, Northland took the position that it was Matthew Husnik's responsibility as owner of the property to install sediment and erosion control. After the July 23, 1996 discussion with Matthew Husnik, John Thomas believed that Matthew Husnik had assumed responsibility and would install appropriate erosion control at the Sandstone site.

21. By mid-August, no effective sediment and erosion control had been installed at the Sandstone site and no permit had been applied for the site. On August 19, 1996, the MPCA sent a letter to Matthew Husnik and Northland, identifying two potential violations of Minnesota law. The first violation arose from the failure to notify the MPCA of a discharge that may cause water pollution. The second violation related to the failure of Northland or Matthew Husnik to apply for a NPDES storm-water permit prior to disturbing the soils at the Sandstone site.

22. The August 19, 1996 letter stated, "if you believe any of the information above is incorrect, please respond in writing within ten (10) days after receipt of this letter." Matthew Husnik did not respond to the letter. Matthew Husnik did not state what efforts he would make to comply with the requirements or what efforts he would make to install erosion control at the Sandstone site.

23. On August 26, 1996, Northland informed the MPCA that it would be installing additional silt fencing at the Sandstone site. On September 9, 1996, Northland sent a letter to the MPCA indicating that "Northland Constructors, Inc., at its own cost, furnished and installed 1,000 LF of silt fence around the perimeter of the construction area." Exhibit 10. Northland also indicated that it did not believe it was its responsibility to take out the permit; however, it would assist Matthew Husnik in filling out the application. Exhibit 10.

24. On September 17, 1996, John Thomas made another site inspection of the Sandstone site. He investigated the additional silt fence that had been installed by Northland. He discovered that the silt fence was installed improperly and was already falling and failing in certain areas. See Exhibits 6A, 6B, 6C, 6D and 6E.

25. Matthew Husnik failed to take the initiative to submit an application for a NPDES storm-water permit for the Sandstone site. Instead, an application was submitted for him by Northland on September 20, 1996. The application was incomplete in several areas. In a letter dated October 16, 1997, the MPCA outlined deficiencies in the application which included the misidentification of the size of the Sandstone site, the omission of water bodies affected by the runoff from the site, and the failure to include the \$240 application fee.

26. On October 22, 1996, John Thomas visited the Sandstone site again to inspect the erosion controls. He found that there continued to be no effective erosion

control in place and that there had been no corrective maintenance of the installed silt fence. As a result of this inspection, he sent a letter to Matthew Husnik and Northland dated October 25, 1996, informing them that the sediment and erosion controls in place at the Sandstone site would not be sufficient to comply with the permit requirements if such a permit was issued.

27. On October 28 and November 1, 1996, John Thomas called Matthew Husnik to request a response to the October 16 and October 25, 1996 letters. Matthew Husnik was uncooperative.

28. For the period May 23, 1996 through September 20, 1996, 25 rain events in excess of 0.125 inches occurred in Sandstone, Minnesota (in the Sandstone area). Those dates include June 2, 5, 16, 13, 26 and 28; July 1, 7, 11, 12, 17, 18, 21, 24, 27, 29 and 30; August 5, 6 and 21; and September 2, 3, 10, 11 and 20.

29. Finally, on November 7, 1996, an acceptable application for a NPDES storm-water permit was received at the MPCA's St. Paul office along with a check for \$240. The application was completed by Northland for Mr. Husnik.

30. At a subsequent inspection of the Sandstone site on December 17, 1997, MPCA investigator John Thomas discovered that the Sandstone site still lacked both effective sediment and erosion controls.

31. In a letter dated April 28, 1997, the MPCA issued an Administrative Penalty Order to Matthew Husnik and Northland for violations of state water quality statutes and rules during the period May 23 through September 20, 1996. The order required Matthew Husnik and Northland to pay a nonforgivable penalty of \$4,325.00.

32. As set forth in the MPCA's Penalty Calculation Worksheet, Exhibit 16, the MPCA's penalty calculations were based on the factors established under Minn. Stat. § 116.072, subd. 2 (1996). The penalty amount assessed against Matthew Husnik and Northland was established using an MPCA penalty calculation method that addresses all six factors of Minn. Stat. § 116.072, subd. 2(b) in two stages: (1) gravity factor ("base penalty") based on: (a) potential for harm and (b) deviation from compliance and (2) adjustments to the gravity factor based on the factors listed in subdivision 2(b). Once a penalty amount was calculated, the decision was made whether to make the penalty forgivable, nonforgivable or some combination thereof in accordance with Minn. Stat. § 116.072, subd. 5(b). Because the violations involve serious deviations from compliance, the MPCA determined that the penalty should be nonforgivable.

33. Both Matthew Husnik and Northland were informed that they had a right to challenge the administrative penalty order by appealing the order in an executive or judiciary proceeding. Both Matthew Husnik and Northland, by letters dated May 17 and May 19, 1997, respectively, requested executive branch proceedings before an administrative law judge. A Notice of and Order for Hearing was issued on August 13, 1997, setting the administrative penalty order for hearing pursuant to the Minnesota Administrative Procedure Act.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Commissioner of the Minnesota Pollution Control Agency and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. § 116.072 (1996).

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. Minn. Stat. § 115.061(a) imposes a duty on any person to report discharges of "any substance or material under its control" which may cause water pollution and requires a "responsible person" to "recover as rapidly and as thoroughly as possible" or take other action to "minimize or abate pollution of waters of the state."

4. Because no effective erosion control was installed at the Sandstone site, Matthew Husnik and Northland failed to minimize or abate the sediment transport from the Sandstone site in violation of Minn. Stat. § 115.061(a).

5. Because Matthew Husnik and Northland failed to report to the MPCA the migration of sediment from the Sandstone site and its drainage into waters of the state, they have failed to comply with Minn. Stat. § 115.061(a).

6. Because the area of the disturbed soils at the Sandstone site exceed five acres of total land area and because the soils were disturbed by "clearing, grading and excavation activities", Northland and Matthew Husnik have engaged in "construction activity" as defined under C.F.R. § 122.26(b)(14) requiring a NPDES storm-water permit for the Sandstone site pursuant to Minn. Rules pt. 7001.1035.

7. Minn. Rules pt. 7001.1040 B. provides that persons who are required to obtain a NPDES storm-water permit must obtain such a permit before they initiate construction at a site. By failing to obtain a storm water permit prior to the initiation of the construction at the Sandstone site Matthew Husnik and Northland have failed to comply with this rule.

8. Matthew Husnik and Northland have failed to prove that the Sandstone site will be used for an exempt activity such as farming or pasturing livestock.

9. The MPCA penalty determination considered all necessary statutory factors and is reasonable and appropriate for the violations found to exist.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### RECOMMENDATION

IT IS RECOMMENDATION of the Administrative Law Judge to the Minnesota Pollution Control Agency that the administrative penalty order assessing a nonforgivable penalty against Matthew Husnik and Northland Constructors, Inc. of \$4,325 be AFFIRMED.

Dated this 25th day of March 1998.

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ALLEN E. GILES  
Administrative Law Judge

### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1 (1996), the Minnesota Pollution Control Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

Reported: Tape Recorded; No Transcript Prepared

### MEMORANDUM

Minn. Stat. § 115.061 (a) provides as follows:

(a) Except as provided in paragraph (b), it is the duty of every person to notify the agency immediately of the discharge, accidental or otherwise, of any substance or material under its control which, if not recovered, may cause pollution of waters of the state, and the responsible person shall recover as rapidly and as thoroughly as possible such substance or material and take immediately such other action as may be reasonably possible to minimize or abate pollution of waters of the state caused thereby.

The record establishes that Matthew Husnik and Northland failed to comply with Minn. Stat. § 115.061(a) above.

The undisputed evidence submitted in this case establishes that large amounts of sediment migrated from the Sandstone site causing water pollution.<sup>[1]</sup> Matthew Husnik and Northland were informed of the water pollution caused by sediment migrating from the Sandstone site to the wildlife pond. At no time from the point that Matthew Husnik was informed, has he made any effort to control or prevent the water pollution continuing from the site. As late as December 17, 1997, the potential for ongoing water pollution as a result of ineffective erosion controls continued at the site. Northland installed silt fence at its own expense at the Sandstone site. However, that

silt fence was not properly installed and has not been serviced or maintained so as to prevent the migration of sediment from the site to waters of the State.

Throughout the enforcement proceeding, Matthew Husnik was uncooperative and unwilling to accept responsibility for the water pollution caused by the runoff from the site. He has offered no defense or explanation as to why he failed to take action to prevent or reduce the migration of sediment from the Sandstone site.

Matthew Husnik also refused to submit an application for a NPDES storm-water permit for the site. The NPDES storm-water permit ultimately submitted for the site was done by Northland. Minn. Rule pt. 7001.1035 requires a National Pollutant Discharge Elimination System (NPDES) permit for storm water discharge if "a person is performing industrial or construction activity".

Based in large part on his after-the-fact discovery of the Woodland Management Plan, Mr. Husnik claimed at the hearing that the intended use of the Sandstone site was for timber production or pasturing livestock or other agricultural purposes. Mr. Husnik argues that this type of use would exempt the Sandstone site from obtaining a storm-water discharge permit according to 40 C.F.R. § 122.3(e).

However, Matthew Husnik and Northland failed to prove that the Sandstone site was being used for agricultural purposes. The evidence at the hearing established that the actual intended use of the Sandstone site was for some type of commercial development. In addition, Matthew Husnik himself has previous experience in commercial development. He proffered this experience and background to establish that he had no serious intent to develop the Sandstone site commercially. Finally, the Judge also notes that the Woodland Management Plan includes objectives such as "provide wildlife habitat and recreation, to improve water quality and quantity, and to prevent erosion." Exhibit 20. Matthew Husnik's stripping trees and vegetation from the property is contrary to these objectives of the Woodland Management Plan.

The testimony and exhibits demonstrate that the MPCA staff gave proper and due consideration to the factors identified in Minn. Stat. § 116.072, subd. 2(b) in determining the penalty amount. In its determination of the penalty amount, MPCA staff was consistent with other enforcement actions in its consideration of the gravity of the violation (potential for harm and deviation from compliance) and other appropriate adjustments. For these reasons, the assessment of \$4,325.00 penalty was reasonable and appropriate.

AEG

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<sup>[1]</sup> "Pollution of water" as used in section 115.061 is defined in relevant part as:

(a) the discharge of any pollutant into any waters of the state or the contamination of any waters of the state so as to create a nuisance or render such waters unclean, or noxious, or impure so as to be actually or potentially

harmful or detrimental or injurious to public health, safety or welfare, to domestic, agricultural, commercial, industrial, recreational or other legitimate uses, or to livestock, animals, birds, fish or other aquatic life; or

(b) the alteration made or induced by human activity of the chemical, physical, biological, or radiological integrity of waters of the state.